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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 655

BERTHA B. FOSTER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

No. 656

HENRY C. BUESCHER, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The district court wrote no opinion. The opinion of the circuit court of appeals (R. 89–97) is reported in 131 F. 2d 3.

JURISDICTION

The judgments of the circuit court of appeals sought to be reviewed were entered November 4,

1942 (R. 97–98). The petition for writs of certiorari was filed January 16, 1943. The jurisdiction of this Court is invoked under section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the Circuit Court of Appeals erred in holding that the estimate of just compensation contained in a declaration of taking is inadmissible in evidence on the question of value.

2. Whether the Circuit Court of Appeals erred in holding that valuation witnesses for the Government were improperly interrogated as to prices which the Government paid for other land.

3. Whether the Circuit Court of Appeals erred in holding that testimony based solely upon the value of the land to the condemnor is inadmissible in evidence.

STATUTE INVOLVED

The Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. secs. 258a–258e, is printed in the Appendix, *infra,* pp. 17–20.

STATEMENT

These two condemnation proceedings were brought by the United States in 1941 to acquire certain farm land for the Iowa Ordnance Plant near Burlington, Iowa. The relevant facts may be summarized as follows:

No. 655: The 235-acre Foster farm is located about six miles from Burlington (R. 62). It consisted of tillable land, timberland, and pasture

land, the latter somewhat cut up by erosion (R. 71–72). The farm was improved by a dwelling house of twelve rooms, approximately 75 years old, two barns, and other smaller buildings (R. 64–66). On January 21, 1941, the day the condemnation proceeding was instituted, the United States filed a declaration of taking and deposited $35,000.00 in court as estimated just compensation (R. 3). At the trial of the case before a jury petitioners' witnesses testified to the value of the property as follows: $43,600.00 (R. 26); $42,300.00 to $47,000.00 (R. 28); $47,000.00 (R. 32); $43,325.00 (R. 33), later increased to $48,000.00 or $49,000.00 (R. 45); $43,025.00 (R. 37), later increased to $48,025.00 (R. 39); $51,000.00 (R. 47); $50,000.00 (R. 48). The two expert appraisers for the Government estimated the value of the farm to be $21,625.00 (R. 66), and $23,270.00 (R. 72), respectively. The jury returned a verdict of $42,000.00 (R. 23).

Much of the evidence upon which the verdict was based was objected to by the Government. Petitioners' witness, Henry R. Naumann, testified on direct examination that the value of the Foster farm was $43,025.00 (R. 37). On redirect he stated that if he had considered the adaptability of the land for ordnance plant purposes his valuation would have been $48,025.00 (R. 39). On recross-examination he admitted, however, that there was not the remotest possibility that an industrial plant would be located on the property

except for the ordnance plant of the Government (R. 43–44). The Government moved to strike his testimony as to the adaptability of the land for industrial uses because it was based solely on the necessities of the Government in taking the land (R. 44). The motion was denied and the Government excepted (R. 44).

Petitioners' witness, E. W. Wischmeier, was then recalled to the stand. Contradicting his testimoney of the previous day that the value of the land would not be augmented if it were used for ordnance plant purposes (R. 36), he stated that his former valuation of $43,325.00 should be increased to "perhaps $48,000.00 or $49,000.00" considering all uses that the farm might be adapted to (R. 45). He admitted on recross-examination, however, that the increased valuation was based upon the erection of the ordnance plant (R. 45–46). The Government's motion to strike this testimony was also denied (R. 46).

The Petitioners then offered in evidence the declaration of taking showing a deposit of $35,000.00 as estimated just compensation. The Government objected on the ground that it was not evidence of value because it was only an estimate and there was no showing that the Secretary of War was authorized to bind the Government on the issue of just compensation (R. 48). The objection was overruled (R. 48), and the court instructed the jury that the statements of the Secretary of War as to the amount deposited were to be weighed "as a statement of one of the parties to the suit as to

what he considered an estimation of just compensation" (R. 19–20). The Government's objections to this instruction were overruled (R. 20–21).

Counsel for petitioners were also permitted, over objection, to ask the Government's witnesses repeated questions on cross-examination as to whether they had considered certain sales of nearby land made to the Government for the ordnance plant (R. 66–69, 74). The questions were so framed that the price per acre was specified and the increase in price over the last sale was stated. This questioning was permitted even though the witnesses testified that they had not considered such sales because they were not voluntary (R. 67–68, 74).

No. 656: The Buescher farm, seven miles from Burlington, consists of 172.52 acres of farm land, of which only 132.52 acres were condemned by the Government (R. 49). The land taken consisted of approximately 35 acres of pasture, the remainder being tillable although somewhat gullied (R. 52, 72). The farm was improved by a modern five-room house and other buildings (R. 53).

Petitioners' witnesses estimated the value of the land taken at $39,000.00 (R. 50); $37,900.00 (R. 51); $34,400.00 or $34,600.00 (R. 53); $35,250.00 (R. 53); $34,100.00 (R. 54); $37,400.00 (R. 56). The Government's witnesses estimated just compensation at $14,000.00 (R. 62), and $13,500.00 (R. 72). Following the same procedure as in the

Foster case, the defendants placed in evidence, over the Government's objection, the declaration of taking showing a deposit of $22,450.00 as estimated just compensation (R. 57). The two cases having been consolidated for trial, the court also instructed the jury that they could consider "as to either case any testimony which is fairly applicable to both cases" (R. 17). The jury returned a verdict of $31,250.00 (R. 78–79).

The Government appealed from both verdicts, contending that the trial court erred (1) in admitting in evidence the estimate contained in the declaration of taking; (2) in allowing petitioners' counsel to interrogate the Government's witnesses as to the prices the Government had paid for other land in that vicinity; and (3) in admitting and refusing to strike testimony based solely upon the value of the land to the condemnor. The circuit court of appeals sustained each of these contentions and remanded the cases to the district court with directions to grant a new trial. The landowners now seek certiorari.

ARGUMENT

1. *The estimate of just compensation contained in a declaration of taking is not admissible in evidence on the question of value.*—The Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U. S. C. secs. 258a–258e, provides a procedure by which the Government, if it desires title to, and possession of, property in advance of final judg-

ment, may acquire the same by filing a declaration of taking and depositing in court the sum of money *estimated* by the acquiring authority to be just compensation for the land taken. A brief examination of the purpose and provisions of the 1931 Act makes it reasonably clear that this estimate is not competent evidence on the issue of just compensation. As this Court recently stated in *United States* v. *Miller,* No. 78, the purpose of this statute is two-fold:

> First, to give the Government immediate possession of the property *and to relieve it of the burden of interest* accruing on the sum deposited from the date of taking to the date of judgment in the eminent domain proceeding. Secondly, to give the former owner, if his title is clear, *immediate cash compensation to the extent of the Government's estimate of the value of the property.* * * * [Italics supplied.]

The Act expressly recognizes that the amount deposited with the declaration of taking is only an estimate. It is not binding on either the Government or the landowner. *United States* v. *Miller,* No. 78, October Term, 1942; *Garrow* v. *United States* (C. C. A. 5), decided November 25, 1942, not yet reported. In the nature of things it is but a "rough or approximate calculation" made from "imperfect or incomplete data" [1] which may

[1] Funk & Wagnalls College Standard Dictionary (1938), p. 401; Webster's New International Dictionary (2d ed. 1939), p. 875; Black's Law Dictionary (3d ed. 1933), p. 687

as well over-estimate (as the above cases demonstrate) as under-estimate the fair value of the land. The relatively approximate character of the estimate is readily understood when it is realized that the Declaration of Taking Act is ordinarily invoked in instances where time is of the essence. The Government officer who signs a declaration of taking under those circumstances rarely has an opportunity to see the condemned property. Necessarily his estimate as to its value is based on information which he receives secondhand. And in view of the time element, the acquiring authority frequently will not even have an opportunity to secure the advice of expert appraisers. Indeed even where an appraisal is possible, it is seldom possible to check the result against the opinions of other experts. The estimate of the amount to be deposited therefore must be based on whatever information is available, even though the acquiring authority feels that under other circumstances and with fuller knowledge he would make a more accurate judgment. Accordingly, the estimate contained in a declaration of taking, predicated as it is on uncertain information, cannot be regarded as an admission by the Government as to fair value and should not be received as evidence on the issue of just compensation.

To allow these hasty and tentative estimates to be received as evidence of value would be injurious not only to the Government but to the condemnees. If it became the practice to admit such estimates in evidence, it is evident that acquiring

officers would be inclined to make their estimates small, so that landowners would gain no advantage by introducing them in evidence. In turn, as was recognized in *United States* v. *Miller, supra,* this would mean that the landowners would be required to wait longer for their money and that the United States would be required to pay larger amounts of interest on deficiency judgments.

For these reasons it is submitted that the court below correctly adhered to the practice which has generally prevailed in the district courts of not allowing the estimates contained in the declarations of taking to go to the jury. See *Garrow* v. *United States,* No. 634, Gov. Br. in Opp. 2–3; *Ramming Real Estate Co.* v. *United States,* 122 F. (2d) 892 (C. C. A. 8); *O'Donnell* v. *United States* (C. C. A. 8), decided December 11, 1942.[2]

2. *Witnesses for the Government may not be interrogated as to prices which the Government paid on purchasing nearby land.*—One of the grounds on which the circuit court of appeals relied in reversing the district court was that petitioners were erroneously permitted, by cross-examination, to introduce evidence with respect to sales of adjacent and nearby lands to the Government for the project here involved.

As petitioners concede, in Iowa no sale (regardless of who is the purchaser) is admissible as evi-

[2] Mimeographed copies of this decision, as yet unreported, have been filed with the Clerk for the convenience of the Court.

dence of value. *Watkins* v. *Wabash Railroad Co.*, 137 Iowa 441, 113 N. W. 924 (1907); *Hubbell* v. *Des Moines*, 166 Iowa 581, 589, 147 N. W. 908 (1914); *Maxwell* v. *Iowa State Highway Commission*, 223 Iowa 159, 164, 271 N. W. 883 (1937); see Note (1939) 118 A. L. R. 869, 905–913. However, on cross-examination a witness may be questioned as to his *knowledge* of sales in the vicinity of the land condemned, not to furnish evidence of value, but to test his qualifications to form an opinion as to value. *Watkins* v. *Wabash Railroad Co.*, 137 Iowa 441, 442–443, 113 N. W. 924 (1907).

This rule, of course, does not permit counsel, under the guise of cross-examination, to introduce in evidence the *price* paid for other land in that vicinity. Counsel for the Government in cross-examining witnesses for the landowners in these cases probably violated this rule by mentioning prices (R. 29, 30, 32, 35, 38, 50). Assuming, as petitioners contend (Pet. 26), that this violation of the Iowa rule justified petitioners' subsequent recital of prices in other sales to independent purchasers, in questions asked Government's witnesses on cross-examination, it did not permit petitioners, in this way,[3] to place in evidence the prices which the *Government* paid for other land in that vicinity. It is well-established

[3] Although witnesses for the Government testified that they had not considered sales to the Government (R. 66–67), appellees' counsel continued to ask these witnesses whether they had considered such sales, the questions being obviously

in jurisdictions where comparable sales are admissible, that evidence of prices paid by the condemnor for other land is incompetent. See *Blick* v. *Ozaukee County,* 180 Wis. 45, 47, 192 N. W. 380; see Note (1939) 118 A. L. R. 869, 893–904. And in Iowa, where no sales are admissible, the special invalidity which attaches to sales to a potential condemnor is specifically recognized. *Simons* v. *Mason City & Ft. Dodge R. Co.,* 128 Iowa 139, 150–151, 103 N. W. 129. Such sales are excluded because they are not sales "by one who wants to buy but is not compelled to buy from one who wants to sell but is not compelled to sell"—the generally accepted test of market value. Cf. *United States* v. *Miller,* No. 78, October Term, 1942. The landowner is confronted with a purchaser possessing the power of eminent domain and hence is not in a position of one "not compelled to sell." And since the land is needed for a particular project, the condemnor is not in the position of one

framed to stress the price paid by the Government (R. 66–69). The following is a typical illustration (R. 69):

> Q. [Appellees' Counsel] Did you take into consideration the sale of Clarence Hockett farm in 1938, 190.5 acres for $17,500.00?
>
> A. Yes, sir.
>
> Q. Did you consider the sale of that Clarence Hockett farm in January, 1941, for $31,720.00, almost double the former purchase price?
>
> Mr. WEBBER. [Government's Counsel] Same objection.
>
> The COURT. That sold to the Government, too?
>
> Mr. HALE. Yes.

"not compelled to buy." As the Iowa Court has pointed out, "such sales are almost always in the nature of a compromise." *Simons* v. *Mason City & Ft. Dodge R. Co.,* 128 Iowa 139, 150–151, 103 N. W. 129.

Therefore the district court erred in permitting petitioners—by the ruse of introducing it on cross-examination—to bring before the jury evidence that was particularly incompetent and would have been inadmissible on direct examination. *Halsey, Stuart & Co.* v. *Farmers' Bank,* 37 F. (2d) 476, (C. C. A. 3); *Harrold* v. *Oklahoma,* 169 Fed. 47, 51 (C. C. A. 8). The court below properly reversed that ruling.

On the assumption that local law does not control the admissibility of this evidence petitioners contend that the decision below conflicts with the decision of the Court of Appeals for the District of Columbia in *Washington Home for Incurables* v. *Hazen,* 70 F. (2d) 847. That case involved the admissibility of earlier sales of nearby property to the condemnor in connection with other enterprises which it contemplated, under circumstances which did not indicate whether the prior sales were voluntary or involuntary. Petitioner's contention that local law does not control the admissibility of this evidence, however, is not well taken. Unlike the question involved in *United States* v. *Miller, supra*—the appropriate measure of compensation in condemnation proceedings—the question here is

how is fair market value to be proved. This question would seem to be a matter of "practice, [or] pleadings" within the conformity provisions of the General Condemnation Act of August 1, 1888, Section 2, 25 Stat. 357, 40 U. S. C., Sec. 258; see *United States* v. *Miller, supra,* at pp. 8–9. Accordingly, even if the *Hazen* case conflicts with the decision below there is no ground for certiorari. Moreover, that case has since been construed by the Court of Appeals for the District of Columbia as placing on him who offers the evidence the burden of showing that the sales were voluntary. *Hannan* v. *United States,* 131 F. (2d) 440 (App. D. C.). No such showing was made by petitioners in the instant case (R. 67–68).

3. *Valuation testimony based solely upon the value of the land to the condemnor is inadmissible.*—As is apparent both from examination of the testimony of petitioners' expert witnesses, Naumann and Wischmeier [4] and the statements of the

[4] Naumann testified on direct examination that the Foster farm was worth $43,025.00 (R. 37), but on redirect examination he testified that he had not considered any increased value that the farm might have because it was taken by the Government for ordnance plant purposes; that if he were to consider such an element, the land would be worth $48,025.00 instead of the previous estimate of $43,025.00 (R. 39). He also testified that the land was valuable for manufacturing purposes, and valued at its best use was worth $48,025.00 (R. 41–43). However, he admitted on recross-examination that the land had always been used as a farm, that the industrial portion of the city of Burlington (six miles away) was not expanding in that direction, that there was not the remotest probability that an industrial site would be located

district judge,[5] the witnesses based their appraisal of the market value of petitioners' land partly on the special needs and necessities of the United States. The Government's motions to strike the testimony on the ground that it was based upon the special value of the land to the condemnor were

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upon this property except for the Iowa Ordnance Plant (R. 43–44).

After Naumann's testimony Wischmeier was recalled (R. 45); contradicting his testimony of the previous day that the value of the Foster farm would not be augmented if it were used for ordnance plant purposes (R. 36), he stated that his former valuation of $43,325.00 should be increased to "perhaps $48,000.00 or $49,000.00" considering all uses that the farm might be adapted to (R. 45). However, on cross-examination he readily admitted that his new estimate was based solely upon the ordnance plant and not upon adaptability for any other industrial purposes (R. 45–46).

[5] That the district court considered that the needs of the Government were a proper element to be considered in arriving at just compensation is clear from the following colloquy (R. 46):

> Q. [Appellees' counsel] What factors, in your opinion, Mr. Wischmeier, make the land particularly adaptable for manufacturing purposes, as of the date it was taken?
>
> Mr. WEBBER. Same objection; no showing.
>
> The COURT. For ordnance purposes. Why don't you place it squarely. What particular adaptation was there for ordnance purposes?
>
> Mr. WEBBER. We object to the ordnance purpose for the same isn't the proper measure of damage; it is incompetent, irrelevant, and immaterial; the needs of the Government and the use to which the Government expects to put the particular area in question not being proper evidence for the consideration of the jury.
>
> The COURT. * * * Overruled. Answer.

overruled. Petitioner now complains that the Circuit Court of Appeals erred in reversing the district court for permitting the special uses contemplated for the land by the Government to enter into the determination of fair value.

The short and familiar answer to this complaint is that "Since the owner is to receive no more than indemnity for his loss, his award cannot be enhanced by any gain to the taker. Thus although the market value of the property is to be fixed with due consideration for all its available uses, its special value to the condemnor as distinguished from others who may or may not possess the power to condemn, must be excluded as an element of market value." [footnotes omitted] *United States* v. *Miller*, No. 78, October Term, 1942, decided January 4, 1943. See also *United States* v. *Chandler-Dunbar Company*, 229 U. S. 53, 80–81; *Olson* v. *United States*, 292 U. S. 246, 261; *United States* v. *Boston Canal Company*, 271 Fed. 877 (C. C. A. 1).[6] And contrary to petitioners' contention (Pet. 33–34) the mere fact that the jury's award was not for the full amount thus testified to does not render the introduction of such evidence non-prejudicial.

[6] Even if the witnesses' testimony were construed as appraisals of the value of the land for industrial purposes generally, the record here makes it clear that aside from the use as an army ordnance plant any other potential industrial uses were purely speculative; and evidence seeking to incorporate such elements in fair value is inadmissible. Cf. *Olson* v. *United States*, 292 U. S. 246, 260–261.

McCandless v. *United States*, 298 U. S. 342, 347–348.

CONCLUSION

The decision of the circuit court of appeals is correct and in accord with the applicable decisions of this Court and the Supreme Court of Iowa. It raises no new question of substance and presents no conflict. It is therefore respectfully submitted that the petition for writs of certiorari should be denied.

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FEBRUARY 1943.